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No. 82-6075

SUPREME COURT OF THE UNITED STATES
1 First Street, N. E.
Washington, D. C. 20543

OCTOBER TERM 1982

NORMAN S. SCHLANG,
Appellant
v.
JACK HEARD,
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

NORMAN S. SCHLANG
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TABLE OF AUTHORITIES

1. Constitution, Article I, section 9, clause 2, "The Privilege of the Writ of Habeas Corpus shall not be suspended..."
2. Constitution, Amendment V, "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" ..."nor be deprived of life, liberty, or property, without due process of law..."
3. Constitution, Amendment VI, "In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense."
4. Constitution, Amendment XIV, section 1, "...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
5. Rule 56(c), Federal Rules of Civil Procedure
6. 28 U.S.C. Sec. 2254

No._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NORMAN S. SCHLANG,
Appellant

v.

JACK HEARD,
Appellee

JURISDICTIONAL STATEMENT

To: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

COMES now NORMAN S. SCHLANG, Appellant in the above-styled and numbered cause, and furnishes this Jurisdictional Statement pursuant to Rule 12 of the Rules of the Supreme Court of the United States and which Jurisdictional Statement is prerequisite to an appeal to this Honorable Court from the judgment of the United States Court of Appeals for the Fifth Circuit.

I.
QUESTION(s) PRESENTED BY THE APPEAL

The central question is whether or not Appellant's due process rights were infringed when summary judgment was granted to Appellee in the District Court where disputed issues of material fact exist in the pleadings?

The United States District Court for the Southern District of Texas granted summary judgment to Appellee on Appellant's verified Petition for Writ of Habeas Corpus where pleadings of both parties contained disputed issues of fact, where Appellant was afforded no evidentiary hearing, there were no discovery proceedings, no depositions or interrogatories, and the United States Court of Appeals for the Fifth Circuit affirmed the summary judgment of the District Court.

Appellant brought suit against Appellee in the District Court on the grounds that Appellant's Texas state court conviction which resulted in imprisonment entitled him to a federal writ of habeas corpus because:

1. The State court summarily overruled his Motion for Leave to Proceed on Appeal in Forma Pauperis (with supporting affidavit of indigency); it failed to conduct an indigency hearing, and thus deprived him of competent counsel and a transcript to make an effective appeal. Underlying this was the State court's summary overruling of a pre-trial Motion for Appointment of Able Counsel (with supporting affidavit of indigency) and requiring Appellant to represent himself in pro per in a jury trial. After conviction, the issue of counsel was not raised by the trial court for the punishment trial, and there, too, Appellant was obliged to represent himself before the court without a jury. The maximum prison sentence was imposed.

It may be noted that in previous trials for the exact same offense (multiple jeopardy, below), Appellant was furnished with court-appointed counsel because he was without funds to hire lawyers. In this last trial under a third variation of the complaints, a different judge presided. After the summary denial of the Motion for Leave to Proceed on Appeal in Forma Pauperis, Appellant unsucessfully petitioned the Texas Court of Criminal Appeals for a writ of mandamus to order the trial judge

to conduct an indigency hearing to establish the need for appointment of counsel on appeal and for provision of a transcript. A valid record of the courtroom events applicable to the summary overrulings of the Motion for Leave to Proceed on Appeal in Forma Pauperis and the Motion for Appointment of Able Counsel are contained in a verified Bill of Exception that was approved by the trial court as proof of the occurrences of the court proceedings complained of. The filing of a verified bill of exception, and its approval by the court, is the procedural method used to preserve matters that have taken place in court but have not been recorded by a certified public stenographer.

2. Appellant was subjected to multiple jeopardy for the exact same offense. The initial trial, Cause No. 403,967, ended in a hung jury, and a new trial was ordered. But before No. 403,967 was re-tried, the prosecution moved to dismiss the complaint.

A new complaint was filed that contained changes in the material allegations that were in the first complaint, and Appellant was tried before a jury in Cause No. 418,170. The resulting conviction was reversed by the trial judge on appeal where it was shown in Appellant's Brief that there was insufficient evidence to sustain the conviction because the prosecution failed to prove each and every element of the offense as defined in the Penal Code. Indeed, the State Appellee's Brief urged affirmance of the conviction. However, a new trial was ordered in Cause No. 418,170. Before No. 418,170 was re-tried, the prosecution moved to dismiss the case.

A new complaint was filed that differed substantially from either of the first two complaints. Appellant was tried before a jury, without benefit of counsel, in Cause No. 454,139, and was imprisoned without having benefit of counsel and a transcript on appeal because he was too poor to pay for either.

3. Appellant was denied a forum to prove that his conviction was had on the basis of perjured testimony. After the third trial, Appellant compared the transcript of the trial in Cause No. 418,170 with the court reporter's notes of the trial in Cause No. 454,139, discovered outright perjury by the prosecution's principal witness, a policeman, and ascertained that the perjury was material and influencing of an adverse verdict, and fell within the definitive scope of the Penal Code chapter on perjury and aggravated perjury.

Appellant extracted the perjured testimony which he inserted in a verified Bill of Exception to Conviction on the Basis of Perjured Testimony, and which Bill of Exception was approved by the trial court. The Bill of Exception was not affecting the ill-gotten conviction, and so Appellant filed a Motion for Court of Inquiry seeking a forum to formally compare the transcript of Cause No. 418,170 with the court reporter's notes of the third trial, for the latter notes were not transcribed because the trial court summarily overruled the Motion for Leave to Proceed on Appeal in Forma Pauperis. The forum of the court of inquiry was obviously the means to obtain the corrective judicial process when perjury has been discovered and its incidence heretofore reported to the court and prosecution. The Motion for Court of Inquiry was summarily denied, and Appellant was left without recourse to effect a reversal of the conviction, and to formally document the perjury, when its incidence was discovered and made known to court and prosecution.

4. Court costs assessed against the Appellant were automatically

converted into additional incarceration time because Appellant was too poor to pay the costs in a lump sum.

The United States District Court for the Southern District of Texas entered summary judgment for Appellee declaring that Appellant failed to state a claim upon which /habeas/ relief can be granted, and the Court of Appeals for the Fifth Circuit affirmed.

II.
OPINIONS OF THE COURTS BELOW

Without affording the Appellant an evidentiary hearing, and in the absence of discovery proceedings, depositions, and interrogatories, the United States District Court for the Southern District of Texas entered summary judgment in favor of Appellee by simply declaring that Appellant failed to state a claim upon which relief can be granted. The District Court in Civil Action No. H-79-1830 entered its summary judgment on January 28, 1981. Motion for Reconsideration was denied on September 28, 1981. Appellant appealed the denial of an evidentiary hearing to the United States Court of Appeals for the Fifth Circuit, and the Circuit Court in Cause No. 82-2052 affirmed the District Court's ruling in an opinion entered on November 18, 1982. Motion for Rehearing was denied on December 20, 1982.

III.
GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED

Appellant is appealing herein the granting of summary judgment to Appellee on Appellant's verified Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. Sec. 2254 where the pleadings contain disputed issues of fact. Summary judgment was granted to Appellee in contravention of Rule 56(c) of the Federal Rules of Civil Procedure.

The statutory provisions believed to confer jurisdiction of the appeal on this Court are embodied in the Constitution, particularly in the due process clause, the prohibition against double jeopardy, and the entitlement to assistance of counsel.

The judgment of the Circuit Court was entered on November 18, 1982. The Motion for Rehearing was denied on December 20, 1982. Notice of Appeal was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit on or about December 30, 1982.

IV.
CONSTITUTIONAL PROVISIONS THAT THIS CASE INVOLVES

The primary or central issue before this Honorable Court is the due process question of denying the Appellant his day in the United States District Court to introduce evidence, testimony and witnesses in support of his sworn pleadings, and to cross-examine and rebut when the Appellee's case is presented in court in support of his unsworn controverting pleadings.

Trial issues, or perhaps more precisely, issues that are relevant to an evidentiary proceeding in the District Court are enumerated here, but are not presented for review by this Honorable Court because the issues were prevented from being litigated in an adversary proceeding. It is the prevention of litigation that is central to this appeal as well as to the appeal in the court below.

1. Whether or not Appellant was indigent, and whether or not an indigency hearing was held;

assistance of counsel on appeal and for defense at trial;

3. Whether or not Appellant was wrongfully denied, because of professed indigency, a trial transcript to perfect an appeal;

4. Whether or not Appellant was in fact subjected to jury trials on three (3) significantly different complaints for the exact same offense, and with two (2) intermediate dismissals of the first two complaints after re-trials on them were ordered;

5. Whether or not there was sufficient evidence to sustain the conviction in Cause No. 418,170, subsequently reversed and remanded by the trial judge who deferred to a judgment of insufficiency;

6. Whether or not a Texas judge's opinion, formal written opinion, exists on the effectiveness of the complaint in Cause No. 418,170;

7. Whether or not Appellant was entitled to, but deprived of, a forum to secure corrective judicial process after the incidence of material perjury was discovered and made known to trial court and prosecution in a verified bill of exception that was approved by the trial court;

8. Whether or not the prison sentence ordered that assessed court costs be automatically converted into additional incarceration time which Appellant was required to serve; and

9. Whether or not spurious documents impugned in a hearing on Objections to the Record appear in the file of Cause No. 454,139.

V.
STATEMENT OF THE CASE

If it please the Court, the following statement of the case is a peripheral matter, for Appellant is merely recapitulating the allegations and pleadings that remain to be litigated and proven in an evidentiary proceeding in the United States District Court. The central issue in this appeal is the summary denial of an evidentiary hearing by the District Court and the Circuit Court's affirmance of that denial to thus prevent a true adduction of the facts under due process standards.

In a Texas state court, Appellant was tried in Cause No. 403,967, and the result was a hung jury. The court ordered a new trial. But before commencement of the re-trial of No. 403,967, the prosecution moved to dismiss the case. A new complaint was filed in Cause No. 418,170 alleging a different set of facts more commensurate with the adduction made in No. 403,967. Before trial of Cause No. 418,170, Appellant moved that the complaint be quashed because it appeared to be defective. The trial court formally ruled in writing that the complaint was valid, and the matter of defectiveness was never again examined in any other Texas court. The jury convicted the Appellant, and he was sentenced to prison. He gave Notice of Appeal, and before the briefs were transmitted to the appellate court, the trial court granted Appellant a new trial on the contention of Appellant that there was insufficient evidence to sustain the conviction. The prosecution in its appellee's brief urged affirmance of the conviction. But before commencement of the re-trial of No. 418,170, the prosecution moved to dismiss the case. A new complaint was filed in Cause No. 454,139, and this third complaint differed significantly from either of the first two complaints because the affiants evidently swore to anything.

Before trial of Cause No. 454,139, Appellant claimed prior jeopardy

in a Special Plea, and moved the trial court for appointment of able counsel on a supporting affidavit of indigency. All pre-trial matters were summarily overruled without hearing, and Appellant was ordered to proceed to trial pro se. Appellant was not allowed to present witnesses in his defense except himself. Appellant was convicted, and was subsequently ordered again to represent himself in the punishment trial before the court without a jury. The maximum prison sentence was imposed, and court costs assessed were automatically converted into additional incarceration time.

An appeal bond fee was raised by the church congregation, but the trial judge unilaterally colluded with the bondsman, the bond was revoked with court sanction, and the court disallowed a refund to the principal. Notice of Appeal was timely filed. A Motion for Leave to Proceed on Appeal in Forma Pauperis (with supporting affidavit of indigency) was timely presented, and it was summarily overruled without hearing, to obligate Appellant to appeal without benefit of counsel and absent a free transcript. Verified Bills of Exception, all approved by the court as a true record of court proceedings, were submitted by Appellant and accepted by court and prosecution as the actual chronicles of the courtroom proceedings not of record. A Petition for Writ of Mandamus to order the trial court to conduct an indigency hearing was denied by the Texas Court of Criminal Appeals, and Appellant was reduced to appealing without a lawyer and perfecting an appeal without effectiveness absent a transcript.

During the pendancy of the appeal within the state, Appellant compared the principal prosecution witness' testimony in the transcript of Cause No. 418,170 with his testimony in the court reporter's notes of Cause No. 454,139. Perjury and aggravated perjury as defined in the Penal Code were discovered. In a verified Bill of Exception, approved by the trial court, the material perjury was documented by Appellant. Subsequently, Appellant submitted a Motion for Court of Inquiry asking for a forum to effect the corrective judicial process when there is documentary evidence that a conviction was had on the basis of perjured testimony and that certain perjury has been made known to court and prosecution.

In his appeal to the Texas Court of Criminal Appeals, Appellant complained about the multiple jeopardy, the denial of counsel and a transcript because of the trial court's failure to conduct an indigency hearing on a motion with supporting affidavit, and the denial of a forum to prove the perjury within a corrective judicial procedure after the perjury had been made known to court and prosecution within a verified and approved bill of exception.

In a terse opinion, the Texas Court of Criminal Appeals stated that Appellant's claims were without merit.Appellant then filed a federal suit against the jailer in a verified Petition for Writ of Habeas Corpus. The United States District Court for the Southern District of Texas granted summary judgment to Appellee without an evidentiary hearing or discovery proceedings (depositions or interrogatories), and ruled that Appellant failed to state a claim upon which relief can be granted. The United States Court of Appeals for the Fifth Circuit affirmed.

VI.

REASONS FOR PLENARY CONSIDERATION OF THE QUESTION PRESENTED

Because of the disputed issues of material fact in the pleadings, Appellant properly should be allowed to prove the allegations of his suit, and Appellee should not be granted summary judgment in violation of Rule 56(c) of the Federal Rules of Civil Procedure. The issues in litigation are numerous, and obviously the parties are in dispute over material facts.

Because it did not set the case for trial or an evidentiary proceeding, it appears that the District Court went outside of the pleadings, and came up with erroneous finds. The District Court, for example, decided that Cause No. 418,170 was tried twice, and then followed by Cause No. 454,139. Appellee jumped on this bad point in his brief to the Circuit Court, always avoiding the issue of whether or not the District Court should have rightfully made any findings without first setting the matter for trial, or appointing an advocate to protect the rights and defend the Constitutional claims of the incarcerated Appellant. However, I am certain that the Circuit Court realized that Appellant could very likely prevail in proving that he was tried first under that certain complaint in Cause No. 403,967 when the attached opinion concedes that trial.

Because it chose to affirm the District Court's granting of summary judgment in favor of Appellee, it also appears that the Circuit Court went outside the pleadings, and came up with erroneous finds that also avoids the umbrella issue of whether or not the District Court should have made any findings without first setting the matter for an evidentiary hearing, appointing an advocate to protect the rights and defend the Constitutional claims of the incarcerated Appellant, or to convene a trial when the Appellant regained his liberty. However, an example of an erroneous find by the Circuit Court was a finding that Appellant was contumacious in a hearing on his Objections to the Record (before transmittal to the highest state court on appeal) where Appellant had impugned spurious documents in order that the record be made to speak the truth inasmuch as no transcript was available because the Appellant was too poor to pay for one and the trial court had summarily overruled his Motion for Leave to Proceed on Appeal in Forma Pauperis. The Circuit Court is of the opinion that the alleged contumacious behavior merited the summary overruling of the Motion for Leave to Proceed on Appeal in Forma Pauperis (with supporting affidavit of indigency) presented and ruled upon some eight (8) months prior to the hearing on Objections to the Record. The Circuit Court was advised of this ambiguity and other erroneous "findings" in Appellant's Petition for Panel Rehearing (copy attached), and the court had nothing to say except "denied," although it had stated in its opinion that it cannot apply the presumption of correctness as mandated by 28 U.S.C. Sec. 2254(d)(1976) when it could not find written state court findings on the subject of Appellant's indigency. Here again we note the "search for the truth" in courthouse chambers where the plaintiff petitioner has not been invited to introduce <u>his</u> proof, evidence, testimony and witnesses in support of his verified petition.

Also, another example of an erroneous finding by the Circuit Court in the absence of an evidentiary proceeding in the District Court was that Appellant made no indication of the perjured statements of the principal prosecution witness. But if Appellant were putting on his own case in a court of law, wouldn't he be a fool not to exhibit the [illegible]

Bill of Exception to Conviction on Basis of Perjured Testimony, approved by the trial court, and which Bill of Exception documents the specific testimony that was perjured as extracted by Appellant from the transcript of Cause No. 418,170 and the court reporter's notes of Cause No. 454,139? The Circuit Court opined that perjury is acceptable in winning a conviction as long as the prosecutor did not condone it or conspire with his witness. But, as he points out in his Appellant's Petition for Panel Rehearing, Appellant has concrete evidence of the district attorney's specific knowledge of the perjury, and, additionally, both court and prosecution were made aware of the incidence of the perjury before Appellant moved the trial court to provide a forum for the corrective judicial process. The point Appellant is trying to make is that it is extremely prejudicial to the litigation and the fact finding mechanism if the Circuit Court can make erroneous findings in chambers when the plaintinff petitioner had not been invited to introduce his proof, evidence, testimony, witnesses, and rebuttals in support of his verified petition in the court below.

Constitutional law and justice would prevail if Appellant were granted an evidentiary hearing to have his day in court instead of the lower courts' granting of summary judgment to Appellee to thus hide and cloak in erroneous findings the deprivations of basic Constitutional rights as claimed by this Appellant.

Fairness and equity would dictate that Appellant be afforded the opportunity to go forth himself (he surely cannot afford a lawyer) with the burden in demonstrating that his conviction was obtained in violation of basic constitutional safeguards. Then, after all the issues and disputed facts are aired in accordance with due process of law, findings of fact and conclusions in law are appropriate.

Of what value is the Great Writ if the inmate, contending confinement in violation of the Constitution, is prohibited from proving his allegations in the federal district court, when neither he nor his advocate has been summoned to the courthouse, and no witnesses, proof, testimony or evidence have a federal forum in a federal adversary proceeding in which to be presented?

WHEREFORE, Appellant respectfully urges this Honorable Court to remand the case for trial in the United States District Court.

Respectfully submitted,
Norman S. Schlang
NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

CERTIFICATE OF SERVICE

Appellant NORMAN S. SCHLANG certifies that a copy of this Jurisdictional Statement was mailed to Ms. Susan Spruce, Assistant District Attorney, 201 Fannin Street - Suite 200, Houston, Texas 77002; Tel.: (713) 221 - 5816; on January 18, 1983.

Norman S. Schlang
NORMAN S. SCHLANG

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SUPREME COURT OF THE UNITED STATES
1 First Street, N. E.
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OCTOBER TERM 1982

NORMAN S. SCHLANG,
Appellant

v.

JACK HEARD,
Appellee

APPENDIX TO JURISDICTIONAL STATEMENT

NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

Norman S. SCHLANG,
Petitioner-Appellant

v.

Jack HEARD,
Respondent-Appellee

No. 82-2052
Summary Calendar

United States Court of Appeals,
Fifth Circuit

November 18, 1982

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, RANDALL and TATE, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's dismissal of a pro se habeas petition under 28 U.S.C. § 2254 (1976). For the reasons set forth below, we affirm.

The petitioner, Norman Schlang, has been tried three times in the Texas courts for the misdemeanor of promotion of prostitution and convicted each time. The first prosecution ended in a mistrial during the punishment phase of the trial, and is not at issue here. After the second trial, Schlang filed his appellate brief with the trial court, pursuant to Tex.Code Crim.Pro.Ann. art. 40.09(7)–(12) (Vernon 1979), as then in force. The brief alleged, among other things, that the evidence had been insufficient to convict him. The trial court granted Schlang's motion for new trial "on the briefs," without any statement of its grounds. Schlang was convicted again and sentenced to one year in jail. The trial court denied his motion for appointed counsel and a free transcript on appeal. The Texas Court of Criminal Appeals affirmed his conviction. Schlang filed a petition for habeas corpus in the district court on September 4, 1979. On April 7, 1980, he was released from jail.[1]

. Since Schlang was in jail when he filed his petition, he satisfied the "in custody" requirement of 28 U.S.C. § 2254 (1976). *Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

In his original habeas petition, Schlang alleged three grounds for relief: that the third trial violated his constitutional protection against double jeopardy; that he was wrongly denied appointed counsel and a free transcript on appeal; and that the State's principal witness committed perjury but no court had permitted Schlang an opportunity to prove it. He later amended his petition to allege that he had unconstitutionally been kept in jail beyond his scheduled release date of April 5, 1980 because he could not pay court costs.

The United States Magistrate recommended that Schlang's petition be dismissed for failure to state a claim on which relief could be granted. Schlang filed various objections to the magistrate's report, but the district court nonetheless adopted it and dismissed the petition. Schlang then appealed to this court, raising all the grounds for relief alleged in the district court.

[1] At the outset, we note that although the magistrate described his recommended ruling on the case as dismissal for failure to state a claim on which relief could be granted, his written findings clearly indicate that he considered matters outside the pleadings in reaching his conclusion. We will, therefore, review the ruling of the district court under the standards applicable to a grant of summary judgment. *Georgia Southern & Florida Railway Co. v. Atlantic Coast Line Railroad Co.*, 373 F.2d 493 (5th Cir.), *cert. denied*, 389 U.S. 851, 88 S.Ct. 69, 19 L.Ed.2d 120 (1967). Summary judgment is proper only when there is no disputed issue of material fact and one party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

[2] The first issue is whether the third trial violated Schlang's right not to be twice placed in jeopardy. He urges that, since his brief before the court had claimed that the evidence was insufficient and the court did not specify the grounds on which it granted the motion for new trial, his retrial was barred by *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). *Greene* prohibits retrial after a reviewing court finds that the evidence of guilt was insufficient to submit to the jury. This claim must fail, however, because the trial court in the second trial never had jurisdiction, and thus jeopardy did not attach. *Grafton v. United States*, 206 U.S. 333, 345, 348, 27 S.Ct. 749, 752, 51 L.Ed. 1084 (1907); *United States v. Ball*, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896); *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *questions certified*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982) (certiorari granted and questions certified on issues not relevant here); *Moore v. Foti*, 546 F.2d 67 (5th Cir. 1977). *See Serfass v. United States*, 420 U.S. 377, 389, 95 S.Ct. 1055, 1063, 43 L.Ed.2d 265 (1975).

[3, 4] In Texas, a "fatally defective" charging instrument does not confer jurisdiction on the trial court. *Ex parte County*, 577 S.W.2d 260 (Tex.Cr.App.1979) (indictment); *Daniels v. State*, 573 S.W.2d 21 (Tex.Cr.App.1978) (indictment); *Bruce v. State*, 622 S.W.2d 624 (Tex.App.—Amarillo 1981, review refused) (information).[2] The offense with which Schlang was charged, promotion of prostitution, had as one of its elements that the offender "knowingly" received the proceeds of prostitution, Tex.Pe-

2. In Texas, the rules on sufficiency of the charging instrument are the same for informations and indictments. *De Santiego v. State*, 146 Tex.Cr. 394, 176 S.W.2d 175 (1943); *Punchard v. State*, 122 Tex.Cr. 134, 54 S.W.2d 110 (1932).

nal Code Ann. § 43.03 (Vernon 1974 & Supp. 1981), but the information failed to allege any mental state.[3] Failure to allege a required mental state is a fatal defect in the charging instrument. *Ex parte Rogers*, 589 S.W.2d 132 (Tex.Cr.App.1979) (en banc); *Zachery v. State*, 552 S.W.2d 136 (Tex.Cr. App.1977); *Tew v. State*, 551 S.W.2d 375 (Tex.Cr.App.1977); *Ex parte Garcia*, 544 S.W.2d 432 (Tex.Cr.App.1976). Thus, the second indictment conferred no jurisdiction on the trial court, so no jeopardy attached at the second trial and the third trial was not barred.

[5] Schlang's second contention is that the third trial court wrongly denied him appointed counsel and a free transcript on appeal. Schlang alleges that there was no indigency hearing, but the record, supplied by the State, conclusively refutes him. The court obviously concluded after the hearing (and indeed said at the hearing) that Schlang was nonindigent and thus not entitled to appointed counsel or a free transcript, but the court made no written finding on the subject. We thus cannot apply the presumption of correctness mandated by 28 U.S.C. § 2254(d) (1976) and approved in *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). Nevertheless, we cannot find either that Schlang was indigent or that his allegations raise a disputed issue of material fact.

At the hearing before the trial court, Schlang failed to present any evidence of indigency. He simply stated that he did not have a job. He refused to produce his income tax return or any records of income or assets, and generally resisted the court's and the state's inquiries into his finances. The discussion culminated in the following exchange:

> "THE COURT: We understand, Mr. Schlang. You don't want to talk about your finances.
>
> THE DEFENDANT: That's not the issue before the Court."[4]

[6] Given Schlang's contumacy and the absence of any evidence of indigency, we cannot disagree with the trial court's conclusion. Neither Schlang's petitions nor his brief on appeal to this court allege any facts on the issue which challenge the correctness of the finding. Summary judgment on the issue was therefore proper.

[7, 8] Next, Schlang alleges that the State's principal witness perjured himself at the third trial and that Schlang has been denied a forum to prove the perjury. The latter claim is clearly baseless: both his state appeal and this habeas proceeding are such forums. He has failed to allege any facts demonstrating that he was prevented[5] from raising the issue in either court. Mere conclusory statements do not raise a constitutional issue in a habeas case. *Unit-*

3. The condition of the record on appeal is somewhat unusual. As discussed below, the state court refused Schlang a free transcript on appeal, and he has not supplied the deficiency. The State, however, has provided a copy of the information on which the second trial was held and the appellate briefs on which the motion for new trial was granted. The State has also furnished the record of the third state trial. Schlang does not dispute the accuracy of these materials.

4. This exchange is in the record supplied to us by the State, *see* note 3 *supra*. It appears in that record at 195.

5. Schlang does point out that his efforts to prove the perjury were hampered by his failure to obtain a transcript of the earlier trials. Since we find, however, that the state court's refusal to order a free transcript for him was justified, *see supra*, any difficulties in proof he encountered were attributable to himself.

ed States v. Jones, 614 F.2d 80 (5th Cir.), *cert. denied*, 446 U.S. 945, 100 S.Ct. 2174, 64 L.Ed.2d 801 (1980); *Mayberry v. Davis*, 608 F.2d 1070 (5th Cir. 1979).

[9] An initial difficulty with Schlang's claim that he was convicted on perjured testimony is that he failed to indicate what statements were allegedly false and why. As noted above, more is required than conclusory allegations to raise an issue cognizable in a habeas proceeding. *Jones, supra; Mayberry, supra.* Schlang argues that he was unable to specify the perjury because he was denied a free transcript. Since we do not find that denial wrongful, however, it does not excuse the failure to identify the allegedly false statements.

[10] Further, Schlang does not claim that the State knowingly used the allegedly perjured testimony. Such knowing use must be shown before habeas relief can be granted. *Jones, supra; Skipper v. Wainwright*, 598 F.2d 425 (5th Cir.), *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). Thus, under the summary judgment standard, Schlang cannot prevail on this ground.

[11] Finally, there is the issue of the extension of his jail time to "work off" his court costs. Since Schlang admits that he was released on April 7, 1980, and alleges no collateral consequences of the extra two days of jail time, we can grant him no relief on this claim in a habeas proceeding. The claim is therefore moot.[6] *Wade v. Carsley*, 433 F.2d 68 (5th Cir. 1970).

It is thus clear that Schlang raised no disputed issue of material fact and that summary judgment was proper. We therefore affirm the district court's dismissal of the petition, which we view as a grant of summary judgment.

AFFIRMED.

6. This claim is not moot in the sense that it fails the "in custody" requirement, *see Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), but in the sense that, since Schlang has been released, there is simply no relief this court can give him in a habeas proceeding.

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
SEP 28 1981
JESSE E. CLARK, CLERK
BY DEPUTY: C. Rangel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

NORMAN S. SCHLANG	§	
	§	
VS.	§	CIVIL ACTION NO. H-79-1830
	§	
JACK HEARD	§	

ORDER

Plaintiff's Motion for Reconsideration is hereby DENIED.

Signed this 28th day of September, 1981.

Robert O'Conor, Jr.

ROBERT O'CONOR, JR.
United States District Judge

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED

JAN 28 1981

JESSE E. CLARK, CLERK
BY DEPUTY:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NORMAN S. SCHLANG,	§	
Petitioner	§	
v.	§	CIVIL ACTION NO. H-79-1830
JACK HEARD, Sheriff,	§	
Respondent	§	

ORDER OF DISMISSAL

The court has reviewed the Memorandum and Recommendation of the United States Magistrate signed on January 5, 1981. The court finds the Recommendation should be, and the same is hereby, adopted as the court's Memorandum and Order. Accordingly, it is

ORDERED that petitioner's application for federal writ of habeas corpus is DISMISSED for failure of petitioner to state a claim upon which relief can be granted.

The Clerk will enter this Order and provide a true copy to all parties.

DONE at Houston, Texas, on this the 28th day of January, 1981.

Robert O'Conor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 21 1982
GILBERT F. GANUCHEAU

NO. 82-2052

NORMAN S. SCHLANG,

Petitioner-Appellant,

versus

JACK HEARD,

Respondent-Appellee.

- - - - -

Appeal from the United States District Court for the
Southern District of Texas

- - - - -

ON PETITION FOR REHEARING

(December 20, 1982)

Before GEE, RANDALL and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL
RULE 17 FOR ISSUANCE OF THE
MANDATE

ENTERED FOR THE COURT:

Carolyn Dineen Randall
United States Circuit Judge

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504—589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

January 4, 1983

Mr. Norman S. Schlang
419 South Main Street, #6
Pasadena, TX 77506

No. 82-2052 - SCHLANG -vs- HEARD

Dear Sir:

Enclosed is a copy of appellant's notice of appeal to the United States Supreme Court, received and filed in this office on this date. This document should be attached as an appendix to appellant's jurisdictional statement to be filed with the Clerk of the United States Supreme Court pursuant to that Court's Rule 15.1(j)(iv).

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Rosalie C. Varino
Rosalie C. Varino
Case Manager

/rcv
enclosure

cc: Ms. Susan Spruce

U.S. COURT OF APPEALS
FILED
JAN - 4 1983
GILBERT F. GANUCHEAU
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NORMAN S. SCHLANG,
Petitioner-Appellant
v.
JACK HEARD,
Respondent-Appellee

No. 82 - 2052

APPELLANT'S NOTICE OF APPEAL

To: THE HONORABLE CIRCUIT JUDGES GEE, RANDALL and TATE

COMES now NORMAN S. SCHLANG, Appellant in the above-styled and numbered cause, and gives this NOTICE OF APPEAL of the judgment entered on November 18, 1982 (Motion for Rehearing denied on December 20, 1982), to the United States Supreme Court.

The original proceeding was brought under 28 U.S.C. Sec. 2254, and appellate jurisdiction lies with the United States Supreme Court.

Appellant's principal burden of complaint on appeal is the Circuit Court's affirmance of the District Court's granting summary judgment to Appellee on Appellant's Petition for Writ of Habeas Corpus where the pleadings of the parties contained disputed issues of material fact and Appellee was thus not entitled to judgment as a matter of law. Appellant's pleadings were under oath whereas Appellee's pleadings were not. Summary judgment in favor of Appellee was in violation of Rule 56(c) of the Federal Rules of Civil Procedure, and appellate jurisdiction lies with the United States Supreme Court.

Respectfully submitted,
Norman S. Schlang
NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

CERTIFICATE OF SERVICE

Appellant NORMAN S. SCHLANG certifies that a copy of this Appellant's Notice of Appeal was mailed to Ms. Susan Spruce, Assistant District Attorney, 201 Fannin Street - Suite 200, Houston, Texas 77002; Tel.: (713) 221 - 5816, on December 29, 1982.

Norman S. Schlang
NORMAN S. SCHLANG

U.S. COURT OF APPEALS
RECEIVED
JAN 4 1983
NEW ORLEANS, LA.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NORMAN S. SCHLANG, Petitioner-Appellant v. JACK HEARD, Respondent-Appellee	No. 82 - 2052

APPELLANT'S NOTICE OF APPEAL

To: THE HONORABLE CIRCUIT JUDGES GEE, RANDALL and TATE

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The original proceeding was brought under 28 U.S.C. Sec. 2254, and appellate jurisdiction lies with the United States Supreme Court.

Appellant's principal burden of complaint on appeal is the Circuit Court's affirmance of the District Court's granting summary judgment to Appellee on Appellant's Petition for Writ of Habeas Corpus where the pleadings of the parties contained disputed issues of material fact and Appellee was thus not entitled to judgment as a matter of law. Appellant's pleadings were under oath whereas Appellee's pleadings were not. Summary judgment in favor of Appellee was in violation of Rule 56(c) of the Federal Rules of Civil Procedure, and appellate jurisdiction lies with the United States Supreme Court.

Respectfully submitted,

/ss/ Norman S. Schlang

NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

CERTIFICATE OF SERVICE

Appellant NORMAN S. SCHLANG certifies that a copy of this Appellant's Notice of Appeal was mailed to Ms. Susan Spruce, Assistant District Attorney, 201 Fannin Street - Suite 200, Houston, Texas 77002; Tel.: (713) 221 - 5816, on December 29, 1982.

/ss/ Norman S. Schlang

NORMAN S. SCHLANG

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NORMAN S. SCHLANG, Petitioner-Appellant v. JACK HEARD, Respondent-Appellee	No. 82 - 2052

APPELLANT'S PETITION FOR PANEL REHEARING

To: THE HONORABLE CIRCUIT JUDGES GEE, RANDALL and TATE

COMES now NORMAN S. SCHLANG, Appellant in the above-styled and numbered cause, and petitions this Honorable Panel to rehear the appeal on the grounds that errors in this Court's independent findings of fact, without benefit of an evidentiary proceeding in the court below, have been made to thereby cause misapplications of law.

The decision in this case to affirm the denial of due process of law and consequently deprive Petitioner of his right to go forth with the burden of proof in a competent evidentiary proceeding has wrongfully resulted in the summary denial of a writ of habeas corpus since matters outside the original pleadings were considered with no advocate appearing to protect the rights of Petitioner in accordance with the rules of evidence.

The Court erred in its Recapitulation of the case, as set forth in its reasons, as follows:

I. Para. 1, P. 709

"The first prosecution ended in a mistrial..., and is not at issue here" is an avoidance of Petitioner's claim that when the prosecution dismissed that first case before the commencement of a new trial, jeopardy did attach in that first cause tried under that certain complaint No. 403,967.

There is no doubt that jeopardy does not attach after a hung jury. What has been the common practice is that jeopardy does not attach after a hung jury pending the retrial of that very same complaint presented to the first jury (emphasis added).

The fact that Petitioner would have proven in an evidentiary hearing in the District Court is that subsequent to the hung jury and before the commencement of a new trial under complaint No. 403,967, the prosecution moved to dismiss the complaint.

If Petitioner had not subsequently been tried for the same offense following the dismissal of No. 403,967, would it be reasonable to say that he was never in jeopardy, because the jeopardy disappeared when the jury failed to agree in the punishment phase? Or, was the Petitioner in jeopardy at the outset of the trial, and the jeopardy disappeared at the conclusion to await another trial on that certain complaint? Petitioner contends and has contended in his Appellant's Brief to this Honorable Court that when the prosecution dismissed the complaint before re-trying complaint No. 403,967, the jeopardy of the outset re-attached, for jeopardy is the fact of trial and not the outcome unless defendant is re-tried under the very same complaint (emphasis added).

What really happened is that the factual allegations of complaint No. 403,967 could not be proven at trial. The prosecution, now having the benefit of the testimony of his witnesses, sought a dismissal to amend the complaint to conform to the testimony that was given in the trial. However, in Constitutional conformity, a hung jury trial is not to be used for the investigation for a subsequent trial of the defendant for the same offense but with different factual allegations in the complaint.

The claim that Petitioner raised upon bringing up the first trial is readily compared to this example. A man is indicted for theft of a diamond ring. At trial the testimony indicates that it was a diamond bracelet that was stolen. The jury is hung, and the judge orders the defendant to stand trial again for theft of a diamond ring. The prosecution dismisses the case before the second or new diamond ring trial. A new indictment specifies theft of a diamond bracelet. Petitioner contends that the defendant was in jeopardy at the diamond ring theft trial when it was dismissed, because the rule in law is that the prosecution must be sure of its case before subjecting the defendant to multiple trials in order to get the facts straight for purposes of securing a conviction. Also, assume that in the diamond ring case, the trial judge denied a defense motion for instructed verdict of acquital after the prosecution rested its case-in-chief preferring instead, a new trial for the defendant.

If it please the Court, Petitioner prays that this Honorable Panel address itself to the issue of jeopardy attachment after a case is dismissed before a new trial is held on the same complaint presented to the first jury. It is certain that if the District Court had held an evidentiary hearing, Petitioner would have introduced evidence relative to Cause No. 403,967.

II. Para. 1, P. 709

"The trial court [second trial, Cause No. 418,170] granted Schlang's motion for new trial 'on the briefs,' without any statement of its grounds" is true, but this Honorable Court avoids the issue that Petitioner would have proven in an evidentiary hearing in the District Court that off to jail he would definitely and positively have gone if he (not the prosecution) had not given Notice of Appeal and filed his appellate briefs.

Petitioner's appellate briefs convinced the trial court that there was insufficient evidence to sustain the conviction. The State's appellee's briefs urged the court to affirm the conviction in Cause No. 418,170.

* * * * *

The following errors that Petitioner finds are identified in the following sections of the Court's opinion:

III. [2], P. 710

"This claim [Schlang's] must fail, however, because the trial court in the second trial never had jurisdiction, and thus jeopardy did not attach" is a spurious conclusion that does not emanate from any ruling on nonjurisdiction by any Texas judge, for the trial court, supposedly without jurisdiction, did put Petitioner in jeopardy and was ready to put him in jail in an instant. The only thing that saved Petitioner ir

the court that "never had jurisdiction" was that he filed a Notice of Appeal and perfected an appeal to the point of preparing appellate briefs that convinced the trial judge of the insufficiency of the evidence, whilst the State urged affirmance of the conviction.

Perhaps the trial court had no jurisdiction, but during the long appeals process Petitioner was under bond, and at every turn felt that his freedom was in jeopardy if there was a goof-up in making the appeal. Plus, there was no assurance that the State appellate court would grant relief.

This Honorable Court is confusing "jurisdiction" and "jeopardy," and the matter of a "spurious argument" in claiming no jeopardy without jurisdiction is addressed in Benton v. Maryland 395 US 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). The U. S. Supreme Court said that indeed there was jeopardy, for the defendant could have quietly done his time--on a judgment from a court without jurisdiction. This legal struggle between valid and defective complaint trials and their relationship to admission to the penitentiary reminds me of the gunman on the deserted street who asks for your wallet. You can give it to him when he asks for it, or you can give it to him when he sticks the barrel in your ribs.

How did this Honorable Court decide that the trial court in the second trial "never had jurisdiction" when there has been no testimony on the matter in an evidentiary proceeding in the District Court? The trial judge denied a defense pre-trial motion to quash, the prosecution did not move to dismiss before the jury was empaneled and sworn, and the State in its Appellee's Briefs urged the court (and all briefs were destined for the Texas Court of Criminal Appeals) to affirm the conviction. Moreover, the trial judge specifically ruled in pre-trial that the complaint was not defective. No higher judge ever overruled him, he never reversed himself, Petitioner never complained about a defect on appeal, the State prayed for affirmance--but when Petitioner moves into federal court on double jeopardy, the State is yelling to federal judges that the trial court was without jurisdiction after having urged in its Appellee's Briefs to imprison Petitioner who had succeeded in convincing the trial judge that there was insufficient evidence. It is doubtful that now the federal court can tell the State court that it had no jurisdiction to try the Petitioner when said court ruled that it did have jurisdiction, and proceeded to try the Petitioner who submitted without complaining. Be it remembered that Petitioner had already been exposed to double jeopardy for having first been tried for the same offense on a different complaint in Cause No. 403,967, but he failed to raise the constitutional issue in the second trial, and said issue dealing with multiple jeopardy was raised in the third trial that was convened under a third variation of a complaint for the same offense.

IV. 5, 47, P. 710

In Cause No. 418,170, Petitioner filed a Pre-Trial Motion to Quash, which would have been placed in evidence had the District Court convened an evidentiary hearing. One ground was the apparent defect in the complaint for failing to allege a culpable mental state. The trial judge overruled the matter by so ruling and signing on the face of the motion, the prosecution said nothing, and the case proceeded to trial. This Honorable Court, without the benefit of an evidentiary hearing in

the court below, has decided that failure to allege a required mental state specifically is a fatal defect in the charging instrument. May not the culpable mental state be implied? Are any speeding tickets in Texas valid when the policeman fails to allege that the defendant willfully, knowingly, or deliberately drove in excess of the limit? Does the City of Pasadena have to prove that a dog owner willfully, deliberately, negligently, or knowingly allowed his pet to run at large? I can assure this Honorable Court that there is a fine if one drives in excess of 55 m.p.h. even if the speedometer is faulty on account of age, and that there is a fine if the dog is picked up even if a neighbor's child let it out of the yard. Yes, the law prescribes a culpable mental state, but it need not be expressed to make a complaint valid. The trial judge in Cause No. 418,170 ruled that it was not necessary to spell out the culpable mental state in the complaint, and his interpretation of State law must prevail. In fact, had the State not dismissed, Cause No. 418,170 would have been tried again on the exact same complaint pursuant to order of the trial judge in granting a new trial.

It is an erroneous conclusion to decide now that the trial court in No. 418,170 had no jurisdiction, that the complaint was defective, and that that was the reason for the judge's reversing the judgment of the jury. If that were truly the case, then how is it explained that the trial judge turned right around, and granted a new trial on that very same complaint No. 418,170? The prosecution then sought a dismissal before No. 418,170 was retried.

It is a fishy kind of system of jurisprudence when the complaint in No. 418,170 leaves out "knowingly," an element of the offense, and thus evidently does not describe a crime as defined in the penal code; the prosecution fails to prove the element, and the jury convicts that defendant on a complaint that does not even comprise a violation of the penal statute. The defendant cries insufficient evidence to sustain the conviction, and a new trial is then granted on that very same complaint. It is noteworthy that one may be convicted on either valid or so-called defective complaints, can be placed in confinement on either, but is in jeopardy only for the valid, even if he is in prison or is about to be placed therein for the defective.

Obviously, the Texas state judge conducting No. 418,170, said the complaint was fine and valid, and he took command to thus place Petitioner in jeopardy. Regardless if the trial court was wrong or right (no higher court ever examined the ruling) in its pre-trial ruling, Petitioner was placed in jeopardy when the jury was sworn, and no Texas judge (including the trial judge) ever ruled that the complaint was defective; the only Texas judge ruling available for placement in evidence is that the absence of "knowingly" did not merit a quash of the complaint, and Petitioner never made further issue of this decision again, but relied solely on the grounds of insufficiency of the evidence.

The prosecution subsequently dismissed the complaint after futiley urging affirmance of the conviction before the commencement of a new trial granted by the trial court for a second bout on Complaint No. 418,170. A new judge heard Cause No. 454,139, a third complaint involving the exact same offense. The U. S. Supreme Court appears to have addressed this matter involving jeopardy on a revision of a complaint in the case of

Crist v. Bretz 437 US 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978). Cunningham v. State 249 SW 2d 203 suggests that if a complaint is fundamentally defective, the judgment is properly reversed, and the prosecution should be ordered dismissed. A former Texas rule that jeopardy will not attach unless there is a valid bill of indictment "...eventually evolved into the now abrogated (emphasis added) Texas procedure..." McElwee v. State 589 SW 2d 455 (delivered Nov. 21, 1979 in Opinion On Remand From U. S. Supreme Court) after the Supreme Court remanded McElwee for further consideration in light of Crist v. Bretz, supra.

Retrial in Texas is not barred if there is actually a dismissal by the court because of an invalid indictment and was done prior to a verdict (emphasis added). Shoemaker v. State 58 Tex Crim 545, 126 SW 887 (1910). This rule received U. S. Supreme Court approval in Illinois v. Somerville 410 US 458 (1973). There the trial court declared a mistrial on the state's motion after it became apparent that the indictment would not sustain a verdict, and the High Court held that retrial was not barred.

Petitioner prays that this Honorable Court reconsider the case of Petitioner where the prosecution's dismissal in No. 418,170 came after a verdict on a supposedly invalid complaint, but after the trial court had already granted permission for retrial of that very same complaint No. 418,170 that it had formally ruled pre-trial as acceptable. Petitioner urged reversal in appellant's briefs on the basis of insufficient evidence, while appellee's briefs urged affirmance of the conviction.

V. 57, P. 711

"Schlang alleges that there was no indigency hearing, but the record...conclusively refutes him" treats a hotly disputed issue of material fact that Petitioner would have ardently advocated in the court below had there been an evidentiary hearing. Indeed, the trial court in Cause No. 454,139 made no written findings of fact on the subject of Petitioner's indigency, for the fact is that no indigency hearing was ever held. Certainly, Harris County Criminal Court-at-Law No. 8 is a court of record, and if there was in fact an indigency hearing, there would have been a record of it, even a clerk's notation or a docket entry to the effect that on such and such date the judge conducted a hearing in response to the Motion for Leave to Proceed on Appeal in Forma Pauperis.

On or about January 13, 1981, Petitioner filed in the District Court a Motion for Verification of Respondent's Allegations seeking an order directing Respondent's coundel to, inter alia, produce the trial court docket sheet that shows the scheduling, or omission, of a hearing on the Motion for Leave to Proceed on Appeal in Forma Pauperis, and a copy of any document or order, if any there be, of the trial court that contains specific findings of fact regarding Petitioner's financial ability to pay for a transcript and for competent counsel on appeal. Even after many proddings, the U. S. Magistrate failed to rule on the Motion for Verification, preferring to deny the writ of habeas corpus without an evidentiary hearing or even a complete review of the probable or potential evidence inasmuch as he was going outside of the pleadings to make a summary judgment on the original habeas petition.

about August 18, 1976, at which time the Notice of Appeal was filed, and a Motion for Leave to Proceed on Appeal in Forma Pauperis (with supporting affidavit of indigency) was presented to the court who overruled it summarily without any hearing whatsoever.

The Texas Code of Criminal Procedure, Art. 40.09, Para. 3, requires that a transcript of the court reporter's notes of the trial be filed within 90 days of the filing of the Notice of Appeal. Indeed, on the basis of indigency as itemized in the affidavit of the Motion for Leave to Proceed on Appeal in Forma Pauperis, no transcript could be had because of the summary overruling of the Motion without hearing within the time prescribed by law.

On April 11, 1977, within 15 days of the clerk's Notice of Completion of the record (absent, of course, a free transcript), Petitioner filed Objections to the Record. In issue at the hearing on Objections to the Record, Petitioner gave sworn testimony to refute the trial court's false "Order Nunc Pro Tunc" (P. 51 of the trial record) which is a treacherous sham placed in the record to cover up the constitutional defects of failure to furnish counsel and a transcript of the trial in response to a Motion for Leave to Proceed on Appeal in Forma Pauperis. The trial record does contain a transcript of the hearing on Objections to the Record, and there is nothing to controvert the Petitioner's revelation and exposure of the trial judge's deception (he no longer is on the criminal bench) in exhibiting a ruling on an indigency hearing that never was. Moreover, no certificate of service is attached to the Order Nunc Pro Tunc indicating that Petitioner would never see it unless he chose to examine the trial record in response to the clerk's Notice of Completion of the record without transcript.

Petitioner filed an Application for Writ of Mandamus (available in the trial record) with the Texas Court of Criminal Appeals to compel the trial judge to hold an indigency hearing, but said application was to no avail, and the appellate court's order is in Petitioner's possession, and would have been entered in an evidentiary proceeding had the District Court convened one.

On September 29, 1976, several weeks after the summary overruling of the Motion for Leave to Proceed on Appeal in Forma Pauperis, Petitioner filed a verified Motion to Show Colorable Need for Transcript (available in trial record) which further strengthens Petitioner's claim of no indigency hearing. It would be strange, indeed, if the trial judge held an indigency hearing after conviction, when he summarily overruled without hearing Petitioner's Motion for Appointment of Able Counsel (with supporting affidavit of indigency) before trial resulting in Petitioner's having to represent himself pro se at trial. Also, no attorney was appointed to represent Petitioner at the punishment trial, although the issue of counsel at this point was mentioned by neither the court nor Petitioner, and no admonishment concerning the necessity of counsel where jail time of one year was going to be assessed.

Moreover, a verified Bill of Exception to Court's Summary Overruling of All of Defendant's Motions Pre-Trial and Post-Trial was lodged, said Bill of Exception expressly addressed the summary overruling of the Motion for Leave to Proceed on Appeal in Forma Pauperis, and said Bill of Exception was in fact approved by the trial judge pursuant to the Texas Code of Criminal Procedure, Art. 40.09, Para. 6.

This Honorable Panel is requested to note August 18, 1976, as the date of the summarily overruled without hearing Motion for Leave to Proceed on Appeal in Forma Pauperis (with supporting affidavit of indigency). Some 8 months later, long after the time for filing a transcript of the trial had expired, the Objections to the Record were filed on April 11, 1977. To be sure, the issue at the hearing on Objections to the Record was limited to revealing and exposing sham documents discovered in the record by Petitioner who had not been served with them. At that hearing, was the issue of whether or not the court truly held an indigency hearing in response to the Motion for Leave to Proceed on Appeal in Forma Pauperis relevant to Petitioner's finances (P. 195 of trial record) when Petitioner sought the hearing to expose deceipt and deception and the omission of due process of law?

VI. [67], P. 711

This Honorable Court is in error in concluding that Petitioner was contumacious in objecting to questions about finances in a hearing brought by Petitioner to correct the existence of spurious documents in the trial record that was going to be sent to the State's appellate court. If the State, or trial judge, really wanted to offer an attorney and transcript upon a finding of indigency after the court's summary overruling the Motion for Leave to Proceed on Appeal in Forma Pauperis, it could have served notice on Petitioner and set a date for hearing on a motion of its own. But, when an unemployed defendant presents a Motion for Leave to Proceed on Appeal in Forma Pauperis (with supporting affidavit of indigency) and after having previously presented a Motion for Appointment of Able Counsel (with supporting affidavit of indigency), it is doubtful that financial resources are available to bring about denials of both Motions, unless, as was the case, the trial court was simply fed up with a defendant who had two previous trials with court-appointed counsel and who refused to plea bargain.

A hearing on Objections to the Record was not the forum for an indigency proceeding. An indigency proceeding should have properly been conducted when the Motion for Leave to Proceed on Appeal in Forma Pauperis was presented; but the Motion was summarily overruled without hearing, and the trial judge stuck into the trial record his Order Nunc Pro Tunc which was discovered by the poor pro se appellant who checked the record when the clerk advised that the record (without transcript, of course) was ready. Contumacious is improperly applied to an advocate who objects to irrelevant, immaterial, and incompetent matters not in issue at a hearing requested by defendant to reveal and expose falsehoods in the record.

The finding of contumacious behavior is erroneous because no evidentiary hearing was ever convened in the court below where testimony in support of such behavior was introduced and subjected to cross-examination. This Honorable Court chose to read something that never was in evidence in an evidentiary proceeding, and concluded that Petitioner had scolded the trial judge who rightfully denied the indigent Petitioner a free transcript and a lawyer on appeal. Nevertheless, an evidentiary proceeding in the District Court would have adduced that the document was the transcript of a hearing on Objections to the Record, which hearing was convened by the trial court close on to a year after it had summarily overruled without hearing Petitioner's Motion for Leave to

Proceed on Appeal in Forma Pauperis. This Honorable Court's extraction of an excerpt from that hearing was merely Petitioner's attempt to maintain the matter at bar free from irrelevant, incompetent, and immaterial issues.

VII. [7, 8]7, P. 711

"[Schlang] has failed to allege any facts demonstrating that he was prevented from raising the issue [of perjury] in either court" simply overlooks the fact that would have been proven in the District Court had an evidentiary hearing been granted, that on August 23, 1976, Petitioner filed a verified Bill of Exception to Conviction on the Basis of Perjured Testimony (available in trial record) that specifically cited the perjured statements. Said verified Bill of Exception was in fact approved by the trial judge pursuant to Texas Code of Criminal Procedure, Art. 40.09, Para. 6. Also, subsequently, on May 6, 1977, Petitioner filed a Motion for Court of Inquiry (available in trial record) seeking a forum to compare the testimony extracted from the transcript in Cuase No. 418,170 (and inserted in the verified Bill of Exception to Conviction on the Basis of Perjured Testimony) with the court reporter's notes made in Cause No. 454,139. Petitioner concedes that since he could not pay for the transcript, and his Motion for Leave to Proceed on Appeal in Forma Pauperis was summarily overruled without hearing, he would have subpoenaed the court reporter, a certified public stenographer, to read her notes of the recent trial which contradicted material facts that could have influenced the verdict in the latter trial. The court of inquiry was the forum to compare testimony in the transcript of Cause No. 418,170, and detailed in the verified Bill of Exception to Conviction on the Basis of Perjured Testimony, with the corresponding testimony in the court reporter's notes of Cause No. 454,139. The Motion for Court of Inquiry was summarily denied.

Defendant always filed documents with certificates of service on prosecutors who heard the perjured testimony in three (3) different trials for the exact same offense. No one of them got up and said, "Judge, we have heard the prosecuting witness three (3) different times, and each time it appears that his testimony changes in regard to material issues of fact, and therefore, we desire Schlang a chance at a court of inquiry, for after all, he wrote that if he cannot prove the existence of perjury in violation of Chap. 37 of the Penal Code, then off to jail he will go dropping his appeal." The letter to the court specifying this offer from the Petitioner is available in the trial record.

This Honorable Panel is requested to address the matter whereby Petitioner sought a corrective judicial process, namely, a court of inquiry (apparently, the appropriate forum to prove perjury in multiple prosecutions after a study of the Texas Code of Criminal Procedure), to introduce evidence of perjury, obviously known to the prosecution, in order to show that his conviction was had on the basis of perjured testimony. The denial of the forum is the issue here, and it may even be that Petitioner was wrong in spite of his verified Bill of Exception to Conviction on the Basis of Perjured Testimony that was eventually approved by the trial court. Mooney v. Holohan 295 US 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935) appears to make the provision of a forum mandatory when the allegation of perjury is raised after a comparison is made by

the defense between a previous trial's testimony and the court reporter's notes of the last trial. The court of inquiry would have caused the formal documentation of the perjury that Petitioner's post-conviction investigation yielded. Was the convicted Petitioner not entitled to a forum to demonstrate perjury, or was jail the only alternative for unyielding pro se advocacy in discovering alterations of material facts documented in the last two trials in a transcript and in the court reporter's notes?

As a matter of fact, Petitioner physically possesses concrete evidence that the district attorney knew about the perjured testimony. But in light of the District Court's refusal to convene an evidentiary hearing, Petitioner was deprived of the procedural means to introduce his proof. It is doubtful that without laying a proper predicate within the legal framework, Petitioner could have merely mailed in his proof and evidence to the U. S. Magistrate or U. S. District Judge, and succeeded in his case without having the evidence subjected to cross-examination, and rebuttal. Incidentally, if it is not believed that Petitioner possesses documentary evidence that the district attorney was aware of the perjury, Petitioner offers to do another year if he cannot produce the evidence at a hearing convened to gather evidence pursuant to the rules of evidence in support of a petition for writ of habeas corpus.

VIII. [9], P. 712

"Schlang argues that he was unable to specify the perjury because he was denied a free transcript" avoids the fact that the court of inquiry would have compared the transcribed testimony of Cause No. 418,170 with the court reporter's reading of her notes taken in Cause No. 454,139. To be sure, the verified approved Bill of Exception to Conviction on the Basis of Perjured Testimony specified the statements that would have been compared had the forum, that is, the Court of Inquiry, been furnished. A more affluent defendant could have compared two transcripts whereas Schlang, who had filed a verified Motion for Leave to Proceed on Appeal in Forma Pauperis (with supporting affidavit of indigency) was reduced to seeking a court of inquiry, the forum of correction, which was summarily denied.

IX. [10], P. 712

Had a court of inquiry been convened, the State, the bench, the bar, and the public would have had the opportunity to hear the perjured testimony upon which Petitioner's conviction was had. But we become facetious if we are implying that the prosecutor would have jumped up, presuming Petitioner prevailed strongly in proving his allegations, and said, "Judge, we have to dismiss this case, for now we know openly that the cop is a liar." Nevertheless, this Honorable Panel is requested to address itself to the fact that a forum to demonstrate perjury was requested, and that forum was summarily denied when verifying supporting data were presented to the trial court.

*****

It took three trials to finally land the Petitioner in jail. The erroneous conclusion reached is that after three trials, two intermediate dismissals, and three different complaints for the same offense and each complaint or variation thereof written by an affiant under oath (one of those affiants surely had to be a liar known to the

prosecution), Petitioner had been jeopardy only once. A transcript of the trial proceedings is denied, and an attorney is refused--when the Petitioner swears that he cannot afford the costs (although court-appointed counsel was furnished for Causes 403,967 and 418,170). The incidence of perjury is discovered, and a forum to prove it up is denied. The second trial, reversed for insufficient evidence, is suddenly declared as having been tried in a court without jurisdiction save only the jurisdiction to imprison the defendant. It is contumacious behavior to object to immaterial, irrelevant, and incompetent matters raised in a particular issue at bar. That allegedly contumacious behavior in a hearing on Objections to the Record is grounds for justifying the summary overruling of a Petition for Leave to Proceed on Appeal in Forma Pauperis (with supporting affidavit of indigency) presented some eight months earlier. Spurious documents without certificates of service on defendant are discovered in the trial record. Court costs assessed are automatically converted into a sentence of additional jail time. And an evidentiary proceeding is disallowed to thus thwart the sprouting of the evidence that will sustain a petition for writ of habeas corpus. Is it not the American system, or better, Constitutional, to settle civil disputes in a court of law where all evidence is introduced in accord with the rules of evidence and due process of law, instead of deciding a petition for writ of habeas corpus in the U. S. District Judge's chamber?

WHEREFORE, premises considered, fairness and equity are requested of this Honorable Panel, and Petitioner prays that this Honorable Panel will remand the case on rehearing to the United States District Court for the Southern District of Texas for an evidentiary proceeding where all evidence will be presented under oath, and subject to cross-examination, and subject to rebuttal by subpoenaed witnesses (all trial judges, prosecutors, and other witnesses are still available in the jurisdiction of the District Court).

Respectfully submitted,

/s/ Norman S. Schlang

NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

Certificate of Service

Petitioner NORMAN S. SCHLANG certifies that a copy of this Appellant's Petition for Panel Rehearing was mailed to Ms. Susan Spruce, Assistant District Attorney, 201 Fannin Street, Suite 200, Houston, Texas 77002; Tel.: (713) 221 - 5816, on November 29, 1982.

/s/ Norman S. Schlang

NORMAN S. SCHLANG

RECEIVED
JAN 21 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-6025

SUPREME COURT OF THE UNITED STATES
1 First Street, N. E.
Washington, D. C. 20543

OCTOBER TERM 1982

NORMAN S. SCHLANG,
Appellant
v.
JACK HEARD,
Appellee

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
(with SUPPORTING AFFIDAVIT)

NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NORMAN S. SCHLANG,
Appellant

v.

JACK HEARD,
Appellee

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

To: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Appellant NORMAN S. SCHLANG asks leave to file the attached Jurisdictional Statement to appeal the judgment of the United States Court of Appeals for the Fifth Circuit without prepayment of costs and for leave to proceed in forma pauperis pursuant to Rule 46 of this Court. Appellant's affidavit in support of this Motion is annexed hereto.

Appellant certifies that a copy of this Motion for Leave to Proceed in Forma Pauperis (with supporting affidavit of indigency) was mailed to Ms. Susan Spruce, Assistant District Attorney, 201 Fannin Street - Suite 200, Houston, Texas 77002; Tel.: (713) 221 - 5816; on January 18, 1983.

Respectfully submitted,

Norman S. Schlang

NORMAN S. SCHLANG
419 South Main Street #6
Pasadena, Texas 77506
Tel.: (713) 472 - 4427

STATE OF TEXAS
COUNTY OF HARRIS

NORMAN S. SCHLANG being duly sworn deposes and says:

I am the Appellant herein and make this affidavit in support of the within Motion for Leave to Proceed in Forma Pauperis on my Jurisdictional Statement to appeal the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court for the Southern District of Texas, which had entered a summary judgment in favor of the Appellee on my verified Petition for a Writ of Habeas Corpus where there were disputed issues of material fact in the pleadings to preclude a summary judgment in contravention of Rule 56(c) of the Federal Rules of Civil Procedure.

Although I am presently employed, my income is considerably below the federally established level for support of my urban family which consists of myself, spouse, and two minor children. I am financially unable to pay the costs of printing or filing the Jurisdictional Statement nor am I able to retain counsel. In the United States Court of Appeals for the Fifth Circuit I was granted leave to proceed in forma pauperis to appeal the summary judgment of the District Court.

There appears to be substantial merit to my appeal because it involves a review of the Circuit Court's affirmance of the summary judgment of the District Court on a verified Petition for Writ of Habeas Corpus where the pleadings of the parties contained disputed issues of material fact. The original habeas petition alleged, inter alia, denial of counsel in trial, punishment, and on appeal; denial of a transcript to make an effective appeal, summary overrulings of motions for leave to proceed in forma pauperis (with supporting affidavits of indigency), multiple jeopardy consisting of three jury trials on three significantly different complaints for the same offense, denial of a corrective judicial forum after the incidence of perjury was discovered and made known to court and prosecution in a verified bill of exception that was approved by the trial court, and a sentence that automatically converted court costs into additional incarceration time which I served for being too poor to pay the costs in lump sum. The recapitulation here of the foregoing allegations is to demonstrate that the Jurisdictional Statement is not frivolous, and is not presented for purposes of delay.

WHEREFORE, premises considered, this Honorable Court is moved to grant leave to proceed in forma pauperis and to appoint a member of the Bar of this Court to serve as counsel.

Norman S. Schlang
NORMAN S. SCHLANG

Subscribed and sworn to before me this 17th day of January, 1983.

Anita M. Hammond
NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, TEXAS
Anita M. Hammond
My commission expires 2-22-85